NO. 10890

United States
Circuit Court of Appeals
For the Ninth Circuit

BRIAN CONNOLLY and DANIEL CONNOLLY,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

Brief of Appellee

John B. Tansil,
United States Attorney,

Merle C. Groene,
Assistant United States Attorney,

Attorneys for Appellee.

Upon Appeal from the District Court of the United States for the District of Montana.

BILLINGS GAZETTE, BILLINGS, MONTANA

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BRIEF OF APPELLEE

APPELLANTS' STATEMENT OF THE CASE

Reluctantly, we are compelled to disagree with a part of appellants' statement of the case. This applies to appellants' statement of the evidence with reference to their specifications of error numbers 1 to 7 inclusive.

In appellants' statement of the case, certain material evidence which was before the trial court is omitted. Also, in appellants' argument, (R. pp. 16-29) inc.) the same omissions are made.

In specifications of error under which the claim is made that there was not sufficient evidence before the trial court to support findings of fact and judgment, we feel that it is necessary to call this court's attention to these omissions. For insance, we fail to find in appellants' brief the following:

1. Witness Stephenson testified that in making his investigation he observed no other cattle bearing a different brand than Mr. Connolly's, (R. 140) and didn't recall noticing any other brands other than Mr.

Connolly's. (R. 141) Again (R. 142)

> "The Units are set up, the carrying capacity. Unit lines are established, and we expect more or less conformity to those lines, in order that we can keep tract of the stock on the Units."

and as to having any complaints,

> "I have had them call my attention to the fact that they had been out there in trespass." (R. 143)

Again (R. 145) he testified that the stock that an Indian permittee is allowed to take in must be within the numerical number contained in the grazing permit. Again (R. 146) witness stated

> "First time I met Mr. Connolly after I came on duty, it was a few days after I came on duty, he came into my office and we talked over this trespass situation, and I advised him then that it would be necessary to restrict his cattle, at lease a whole lot more than they had been in the past to the area that was permitted to him."

And again (R. 147)

> "Mr. Connolly told me then that those were Indian stock; that they could run anywhere on the Reservation that he wanted them to."

Witness Girard testified that he counted forty-eight head of horses bearing the Connolly brand on the lands involved in this action. (R. 149-150). Again there were thirty-six head of cattle with the Dan Connolly brand on the land involved. Also one hundred head of cattle belonging to Mrs. Sinclair. (R. 151). Also forty-five head of cattle belonging to Ryan. (R. 151). Also forty-two head of cattle belonging to Payne, these cattle being brought to the cattle range by Mr. Payne. (R. 151-152). These cattle ran with the Connolly cattle.

(R. 151). And when he saw these cattle on the lands in question he saw some of Mr. Connolly's cattle and horses with them. (R. 153). Connolly took care of cattle for other people. (R. 126-127).

3. Witness Barrett testified that he counted twenty-five head of cattle and twenty-five head of horses on the land in question in 1941. (R. 158). Again, every day that he passed through that area he saw horses and cattle on the Blood allotments. The horses bore the Connolly brand. These cattle belong to both appellants. (R. 161).

4. Witness Young saw thirty-two head of horses bearing the Connolly brand. There were no other horses or livestock other than the Connolly livestock. (R. 166). Again, witness testified that the Connolly horses had been encountered so many times that upon this occasion they counted the horses. (R. 167).

5. Witness Stephenson testifying again stated that at the time this action was commenced appellants had no other lands on the Blackfeet Indian Reservation to which they were entitled to the use and occupancy, but since the commencement of the action they had acquired additional lands. (R. 173).

In addition to the foregoing, there are other and further facts in the record which appellants have not called to the attention of this court, either in the statement of case or in their argument.

APPELLANTS' CONTENTIONS

Fourteen specifications of error are made by appel-

lants but briefly they may be grouped for argument into the following:

1. The evidence was and is insufficient to sustain the judgment.

2. The trial court had no jurisdiction to impose a judgment of $258.00 against appellants.

3. The lower court erred in sustaining a motion to strike portions of the amended answer of Brian Connolly.

4. The lower court erred in denying appellants' motion for a new trial.

We will address ourselves to these propositions as advanced in appellants' brief.

ARGUMENT

1.

Appellants claim that the evidence was and is insufficient to sustain the judgment. This claim involves the question of the sufficiency of the evidence to sustain the findings of fact by the trial court. We respectfully submit that the burden is upon appellants here to show that the evidence is wholly insufficient to support the findings and the judgment, and in appellants' brief they have wholly failed to sustain this burden.

We must bear in mind that this case was tried to the lower court without a jury under a situation where, under the rules of court, appellants were in the position of having waived a jury.

A finding of fact by the court sitting without

a jury is equivalent to a verdict and hence will be disturbed only when it is clearly erroneous. An appellant court will not disturb the findings of the trial court on questions of fact unless it be made to appear that the latter court is clearly in error in its conclusions.

Vineyard L. S. Co. c. Twin Falls, etc., Co., 9th Circuit (Ida.) 245 F. 30.

Standard Oil Co. v. Ship Owners, etc., Co. (CCA—Cal) (17 F (2) 366)

Findings of court on questions of fact when jury has been waived are conclusive in the courts of review.

Dooley v. Pease, 180 U. S. 126-45, L. ed. 457.

Findings of trial court on questions of fact, unless manifestly erroneous, will be affirmed.

(CC Ore.) **W. H. Markell & Co. v. Mutual Benefit, etc., Co.,** 63 F (2) 193.

Where a case is tried by the court without a jury its findings upon questions of fact are conclusive in the appellate court.

Empire, etc., Co. v. Bunker Hill, etc., Co., (Ida) 114 F 417.

That appellants waived a trial by jury is borne out by the record:

Rule 38 of the Rules of Civil Procedure for the District Court of the United States preserves the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States; but, under the rule a litigant, in a civil action, who does not seasonably demand a jury, as provided by the rule, waives the right and may not have a jury trial.

United States v. Strewl. C.C.A. N.Y. 1938, 99 F. (2d) 474, certiorari denied.

Strewl v. United States. 1939, 50 S. Ct. 489, 306 U. S. 668, 83 L. Ed. 1063.

The law is now well established that a jury trial as a matter of right is waived by failure to serve demand for a jury trial as required by Rule 38(d).

Suffin v. Springer, D.C. N.Y. 1940, 1 F.R.D. 256.

Alfred Hofmann, Inc. v. Textile Machine Works, D.C. Pa. 1939, 27 F. Supp. 431.

MacDonald v. Central Vermont Ry., D. C. Conn. 1940, 31 F. Supp. 298.

Further as to willful intent, we quote from the decision of the lower court (R. 40) as follows:

> "While there are some discrepancies in the testimony of the witnesses as contended by counsel for defendants, there is sufficient credible testimony to satisfy the court that the defendants have been trespassing as alleged in open violation of the statute and regulations, resulting in damage to the property of others, although warned by the Government representatives on the reservation to desist. That the attitude and intent of the defendant, Brian Connolly is clearly shown in his violation of the temporary injunction issued by this court in this cause. On many occasions the witnesses observed the Connolly horses and cattle in trespass both before and after the commencement of this suit. The evidence shows that his livestock scattered for a distance of ten to twelve miles from his range unit. His explanation was that the cattle had strayed, and in answer to a question in that respect replied that they had always done that."

So that we respectfully submit that appellants have no standing here on this appeal to question the sufficiency of the evidence to support the findings and judgment as a careful reading of the record shows ample facts upon which the lower court based its deci-

sion. As we have heretofore indicated, the argument of appellants on the claimed insufficiency of the evidence is based upon a misconception of the evidence that was offered, in that appellants have failed to refer to a great many matters of evidence, a few of which we have called to the attention of this court heretofore in this brief. For instance, on page twenty-five appellants state that the records fail to show a single incident when either of the defendants failed to remove their livestock from the land, yet a reference to the record disposes of this contention. For instance, (R. 146-147) where witness Stephenson testified that he talked the trespass situation over with Mr. Connolly and told him it was necessary to restrict his cattle, at least a whole lot more than he had been in the past and Connolly told Mr. Stephenson that the cattle were Indian stock and that he could run them anywhere on the Reservation that he wanted to. Again, on page twenty-eight of brief, appellants say that the cattle were grazing on open, unfenced lands. This is taken from the testimony of appellant Brian Connolly, but the Government witnesses testified differently. For instance, at pages 136 and 137 of the record, testimony of the witness showed that the cattle ranges on the Reservation were all fenced as of November, 1941, and at all times thereafter. It is therefore impossible to answer the arguments of appellant as to the evidence when they have omitted a great many material portions thereof. It is respectfully submitted that this portion of appellants' argument is without merit.

2.

Appellants claim that when the court awarded damages in the sum of $258.00 for the trespassing stock that this was not justified by the pleadings and by the evidence and error is claimed therein. This portion of the argument is discussed on pages twenty-nine to forty-one inclusive of their brief. The lower court awarded to the Government the sum of $258.00 damages or penalty as provided by Section 179, Title 25, USCA. This provides that every person who drives or otherwise conveys any stock of horses, mules or cattle to range and feed on any lands belonging to any Indian or Indian tribe without the consent of such tribe shall be liable to a penalty of $1.00 for each animal of such stock. The record shows that there were twenty-five horses in wilful trespass on July 5, 1941, forty-eight horses and twenty-five cattle in similar trespass on August 6, 1941, twenty-five horses and forty-five cattle in wilful trespass on August 8, 1941, thirty-two horses on August 13, 1941, and thirty-six horses and twenty-two cattle on October 21, 1941, making at $1.00 a head a total of $258.00. As was held by the Supreme Court of the State of Montana, in **Cook v. Hudson,** 110 Mont., 263, the act was designed to protect Indian lands against harmful trespass and the statute is directory and not mandatory.

Since the record is replete with sufficient facts to justify wilful trespasses on the part of the defendant, we fail to see wherein this argument can have any basis. Throughout the entire argument of appellants

they attempt to make the new Federal Rules of Civil Procedure inapplicable to the case at bar so as to come under the authority of the **United States v. Ash Sheep Co.** (Mont.) 250 F. 591, 64 L. Ed. 507.

As their basic authority therefore, they cite Subdivision (2) of Paragraph (a) of Rule 81 apparently because it contains the clause "* * * and forfeiture of property for violation of a statute of the United States." With this clause as their foundation, the defendants then endeavor to point out that the instant trespass action becomes an action for "forfeiture of property" under Section 179, Title 25, U.S.C. Their quotation closes with the clause, " * * * shall forfeit the sum of one dollar for each animal of such stock." Before proceeding further, we desire to call the Court's attention to the fact that the defendants have not correctly quoted the language of Section 179, Title 25, U.S.C. because that section does not contain the word "forfeit". But, even if it did, there is no merit to the defendants' argument that Rule 81 (a) (2) would have any application to the instant action, which as stated before, is an action in trespass and no stretch of the imagination can throw it under a " * * * forfeiture of property for violation of a statute of the United States," as required by the rule. Anyone who is familiar with Federal procedure readily recognizes that the "forfeiture of property for violation of a statute of the United States," as set forth in Rule 81 (a) (2), refers to actions involving violations of the Federal

Laws, such as the Pure Food, Drug and Cosmetic Act, the Internal Revenue Laws, Custom Laws, Indian Liquor Laws, and the like. These are generally actions in rem, and usually follow the proceedings in Admiralty in so far as such procedure is applicable. It is therefore apparent that the defendants have misquoted Section 179, Title 25, U.S.C. and misinterpreted the purpose of Rule 81 (a) (2) in their desire to escape established procedure and the decision of this Court. Their constant reference to "a forfeiture of $258.00" finds no basis in the law or facts of the case.

The case of **United States v. Ash Sheep Company,** D.C. Mont. 1916, 229 F. 479, affirmed C.C.A. 1918, 250 F. 591, and affirmed 1920 40 S. Ct. 241, 252 U.S. 159, 64 L. Ed. 507, cited by the defendants, was decided by the Supreme Court of the United States in 1920, under the old Equity Rules long before the adoption of the present Rules of Civil Procedure for the District Courts of the United States, so it can hardly be considered as authority for procedure under the new rules.

We all recognize that the new rules merely abolish differences in procedure between law and equity and do not affect the differences between legal and equitable rights and remedies.

> **Sun Oil Co. v. Burford,** C.C.A. Texas 1942, 130 F. (2d) 10, vacating 124 F. (2d) 467, certiorari granted, 1943, 63, S. Ct. 265, 87 L. Ed.

But by the new rules the distinction between legal and equitable forms of action have been abolished so that it is now only one form of civil action. And that, as

the court pointed out in **Columbia River Packing Association v. Hilton**, D. C. Or., 1940, 34 F. Supp. 970, damages can properly be claimed and allowed in an action for an injunction.

And the pleadings put in issue facts necessary under Section 179, Title 25, U.S.C., and supported such relief under Rule 54 (c) even though not specially prayed for in the complaint. Furthermore, it is noted (R. 86) that at the commencement of the action counsel for the Government in opening statement specifically referred to the penalty statute without any response of appellants or their counsel or demand for jury trial of that issue. This, we respectfully submit, is a further waiver of any claim or demand for a jury or claim that the question of damages under Section 179 was before the trial court.

The Montana cases that the defendants have cited as sustaining their contention that damages may not be granted in an equity action are not applicable here, because, Federal courts must grant equitable remedies in accordance with their own rules without limitation or restraint by state legislation,

> **Black & Yaten v. Mahogany Ass'n.**, C.C.A. Del. 1942, 129 F. (2d) 227, reversing D.C. 34 F. Supp. 450, certiorari denied 1943, 63 S. Ct. 76, 87 L. Ed.
>
> **Geist v. Prudential Ins. Co. of America**, D.C. Pa. 1940, 35 F. Supp. 790.

and it is well established that, as hereinbefore cited, damages can be had in an action for injunctive relief.

The trial court in its decision (R. 39-51 inc.):

"Under the practice established by the rules of civil procedure there is no distinction between actions at law and suits in equity. To permit the imposition of a penalty it is not necessary to consider whether this case should have been begun originally as a law action or as a suit in equity, and, it does not appear that it would make any difference whether counsel had specifically demanded in the complaint the remedies to which plaintiff would be entitled. The court should grant the relief to which a party is entitled even though demand for such relief has not been made in the pleadings. (Rule 54 (c), 28 U. S. C. A. following Sec. 723c).

"As it seems to the court, whether the complaint in this action is regarded as an action at law, with equitable relief incidentally prayed for, or whether the complaint be considered as an action at law and a suit in equity joined, the parties are, as a matter of right, entitled to a trial by jury on all legal issues raised, if demand for a jury is made as the rules provide. Fitzpatrick v. Sun Life Assurance Co., 1 F.R.D. 713; Ransom, et al vs. Staso Milling Co., 2 F.R.D. 128."

And appellants proceed further on page thirty-five to forty-one inclusive to argue that the United States had no jurisdiction in an action of this kind for the reason that the sole authority belongs to the Indian tribes under their treaties with the Government. Since we propose to discuss this matter later on in another subdivision in this brief we will omit further reference thereto at this time.

3.

The next error complained of is that the lower court erred in sustaining the Government's motion to strike certain allegations of the amended answer of the de-

fendant Brian Connolly and at pages forty-two to fifty-three inclusive of their brief, appellants argue at length as follows: (a) That the defendant had written authority to graze a specific number of livestock on any part of the Blackfeet Indian Reservation. (b) That the defendant had a vested right by treaty to graze on the unfenced lands of the Indian Reservation; and (c) That defendants had a right by custom to let their livestock roam and graze over the lands thereon.

(a) Defendants' "On-and-Off" Theory of Defense.

In support of their first contention, the defendants allege (Line 20, Paragraph I, Page 4 of the Defendants' Further Answer, to and including Line 12, Paragraph I, Page 5) their theory of "on-and-off grazing privileges," which they claim is based on recognized custom. (R. 27-28). It is the Government's contention that such allegations were immaterial and were subject to its motion to strike; because, the defendants have absolutely no right to trespass upon the lands involved in this action; that said lands are not near the lands upon which the defendants are permitted to run their livestock as to be susceptible to the natural drifting of said livestock thereon; and that the defendants have no "on-and-off grazing privileges," or any other rights whatsoever, on the lands and premises which are made the subject of this action.

Lines 17 of Paragarph I on Page 5 of said answer, down to and inclusive of the word "complaint" on line 26 of said paragraph and page, were likewise subject

to the plaintiff's motion to strike in that they contained allegations relative to the defendants' rights in other lands, which are not involved in and the subject of this action. Such allegations merely tend to cloud the issues in the case at bar and are therefore immaterial. They are neither admissions, nor denials of any of the averments contained in the complaint, nor authorized by law providing for the filing of a cross-complaint.

> **Securities State Bank of Roy v. Melchert,** 66 Montana, 535, 538, 216 P. 340; Rule 12f of the Rules of Civil Procedure for the District Courts of the United States; Section 9166, Revised Codes of Montana, 1935.

We are at a loss to understand, why the defendants, are attempting to invoke "on-and-off grazing privileges" as a defense in this case. Such privileges, contrary to the defendants' allegations, are based on well-defined regulations which have been duly and regularly promulgated by the Secretary of the Interior in accordance with the Acts of Congress. (See Section 71.20, Title 25, Code of Federal Regulations of the United States of America). They are not the outgrowth of established custom but were instituted to take care of certain financial inequities which do not arise in this action. Such privileges apply only to lands on which the permittee has a right to graze. They arise only when fixed by contract and are specifically contained in a grazing permit. Such "on-and-off" grazing privileges" cannot, by any stretch of the imagination, be used as a defense for the defendants' trespasses in

the case at bar, or interpreted as a license for said defendants to trespass on the lands of others.

(b) Defendants' Defense of Vested Right by Treaty.

The second type of defense set forth by the defendants (Paragraphs II and III of their answer) is an attempt to claim a vested right to graze their cattle and horses on the unfenced lands of the Blackfeet Indian Reservation, which they contend is based on a treaty right established in 1855 under the Treaty of Laramie.

A—Congress May Abrogate Indian Treaties.

We will not quote from that treaty because anyone who is familiar with Indian law knows that prior to 1870 it was the policy of Congress to deal with Indians by treaty; but, it is now, and for a long time has been, well-established law that the Congress may abrogate the provisions of an Indian treaty.

Taylor v. Morton, 2 Curtis 454;

The Clinton Bridge, 1 Walsworth 155;

Cherokee Tobacco, 11 Wall. 616 (1870);

Lone Wolf v. Hitchcock, 187 U. S. 553, 565;

Ward v. Race Horse, 163 U. S. 504.

When one considers Section 6, c. 576 of the Act of Congress of June 18, 1934, 48 Stat. 986; 25 U.S.C. 466, which reads as follows:

> "The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, **to restrict the number of livestock grazed on. Indian range units to the estimated carrying capacity of such**

> ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes." (Boldface ours.)

and the rules and regulations promulgated thereupon (Sections 71.1 to and inclusive of 71.26, Title 25, Code of Federal Regulations of the United States of America) there can be no question about the abrogation of any rights that the defendants may have acquired under the Laramie Treaty in 1855.

B—Ratification of Regulations by Blackfeet Tribe.

The Blackfeet Tribe of the Blackfeet Indian Reservation in compliance with the provisions of the Wheeler-Howard Act (June 18, 1934, c. 576, sect. 16, 48 Stat., 987, 25 U.S.C. 477, as amended by the Act of June 15, 1935, 49 Stat. 378, 25 U.S.C. 478) became an organized Indian Tribe and was granted a Corporate Charter by the Secretary of the Interior on June 18, 1936. Paragraph 3 of Article 5 of its Charter provides:

> "No action shall be taken by or in behalf of the Tribe which is in conflict with regulations authorized by section 6 of the Act June 18, 1934, or in any way operates to destroy or injure the tribal grazing lands, timber, or other natural resources of the Blackfeet Indian Reservation." (R. 305)

Thus, by its own action the Blackfeet Tribe has ratified Section 6, c. 576 of the Act of Congress of June 18, 1934, 48 Stat. 986, 25 U.S.C., 466 (above cited) and the rules and regulations promulgated thereunder by the Secretary of the Interior. As a matter of fact, the Blackfeet Tribe by resolution adopted by its Business

Council in regular session assembled on November 2, 1939, (Resolution No. 35) (R. 265) went much further than the Secretary of the Interior to eliminate any grazing rights, such as the defendants claim, by stating that, "Free grazing privileges on the Blackfeet Reservation are abolished." It becomes apparent that if the defendants ever had any rights under the Laramie Treaty of 1855, to graze their livestock on the unfenced lands of the Blackfeet Indian Reservation, that such right has been abrogated in toto by the above-cited Act of Congress and the specific action of the Blackfeet Indian Tribe. The Laramie Treaty therefore no longer affords the defendants a defense for their unlawful trespasses. Their allegations in relation thereto, as contained in their answer, are immaterial and impertinent and were properly stricken therefrom in accordance with the appellees' motion to strike.

(c) Defense of Long Established Custom.

The defendants' third defense in avoidance (Paragraph I at the bottom of Page 6 of their answer and continuing on Page 7 thereof) sets forth a right under long established custom, to allow their livestock to roam and graze on the lands of the Reservation. Such a defense is kindred to their "Defense of Vested Right by Treaty" hereinbefore discussed. All that has been said in relation thereto likewise applies herein. The allegations thereof are subject to the plaintiff's motion to strike in that they are redundant, immaterial and impertinent.

Custom Must Give Way to Established Law.

If the custom, which the defendants allege, had ever been established, which we do not admit, such a custom would have to give way to the expressed legislation which now prohibits any such practices.

Wolfe v. Shell Petroleum Corporation, 83 F. (2d) 438, cert. denied 57 S. Ct. 19, 299 U. S. 553, 81 L. Ed. 407.

Wolfe v. Texas Company, 83 F. (2d) 425 cert. denied 57 S. Ct. 15, 299, U. S. 553, 81 L. Ed. 407.

Swift, etc. Co. v. U. S., 105 U. S. 691, 26 L. Ed. 1108.

Walker v. Western Transp. Co., 3 Wall. 150, 18 L. Ed. 172.

Cudahy Packing Co. v. Narzisenfeld, 3 F. (2d) 576.

Ettien v. Drum 32 Mont. 311, 318, 80, P. 369.

Penn v. Oldhauber, 24 Mont. 287, 61, P. 649.

It is respectfully submitted that the motion to strike was properly sustained.

4.

Appellants next claim that the lower court was in error in denying the motion for a new trial, but the matters involved are all covered elsewhere in the briefs and for that reason no further argument will be made at this point.

SUMMARY

This action, in regular form, was brought by the United States of America, as plaintiff, against the defendants, who are Indian Wards of the United States Government and members of the Blackfeet Tribe of

Indians, to obtain injunctive relief and damages for the unlawful trespassing of the defendants' livestock on allotted Indian lands of the Blackfeet Indian Reservation, on which the defendant have no right or interest.

All that the plaintiff asked was that the defendants be made to realize that they must comply with the Acts of Congress and the rules and regulations promulgated thereunder insofar as they relate to the grazing of livestock on the Reservation; and, that even a member of the Blackfet Tribal Council, such as the principal defendant, Brian Connolly, happens to be, cannot defy the Indian Service and refuse to comply with established law and order by attempting to invoke Tribal Regulations of his own creation. That regardless of their Indian status, the defendants should realize that they have no right to trespass upon the allotted Indian lands of their less ambitious and less fortunate fellow tribesmen in violation of the rules and regulations that have been established by the Secretary of the Interior, in accordance with the Act of Congress.

The question submitted to the trial court was: Does an Indian person, who is a ward of the Government of the United States and a member of the Blackfeet Tribe of Indians, have to comply with the grazing rules and regulations of the Secretary of the Interior on the Blackfeet Indian Reservation; or, may such an Indian person disregard the rules and regulations of the Secretary of the Interior and without restrictions allow his personally-owned livestock, and livestock in which he may have an interest, to run-at-large on the Black-

feet Indian Reservation?

Indian Lands Distinguished From Public Domain

Before the western part of the United States became settled, and when commonly known as the "Great Open Spaces," it was the policy of Congress to encourage settlement of the public domain—practically without any sort of restriction. In line with this policy, the doctrine of "Implied License" **(Buford v. Houtz** 133 U. S. 320) had its inception; whereby, it was legally recognized by the Supreme Court of the United States that one had a right to graze one's livestock and allow them to run-at-large on the open ranges of the public domain. In these early days of the west, if a settler or homesteader happened to be surrounded by public domain, on which livestock ran-at-large, it was the burden of such settler to "fence-out" if he wished to protect his lands from livestock trespasses. When the public domain became more settled, the doctrine of "Implied License" became more limited **(Light v. United States,** 220 U. S. 553) and finally the theory of the "open range had to give way to the theory of the "greatest good for the greatest number." **(United States v. Tygh Valley Land Co.** 76 F. 694.) Herd districts were later established which required livestockmen to "fence-in" rather than the land owner to "fence-out." The Supreme Court of the United States subsequently placed additional restrictions on the livestock interest **(Lazarus v. Phelps,** 152 U. S. 81; and **Light v. United States,** 220 U. S. 523) as the public

domain gave away to settlement. Finally the Congress of the United States realizing that the public domain could no longer carry an unrestricted livestock industry passed the Taylor Grazing Act of June 28, 1934, (48 Stat. 1269, Sects. 315, 315n, Title 43, U. S. C.) which has completely eliminated the unrestricted use of the public domain and done away with the "open range" of the Old West.

Long before the Civil War, Congress began to make use of its treaty-making powers with the Indians and started to set aside Indian reservations for the exclusive use of the various Indian tribes. Its paramount authority over such reservations and the Indians occupying them has never been questioned. **(Lone Wolf v. Hitchcock,** 187 U. S. 553.) As the white man's frontiers pushed into the Indian country, these various Indian reservations decreased in area from time to time until the Indian country was no longer a "hunting ground" for its Indian occupant. If the Indian were to survive he had to adjust himself to the life of an agistor with the hope that he might ultimately gather flocks or herds of his own or become an agriculturist. The westward march of civilization ultimately surrounded the Indian reservation and the greedy white livestock interest began to trespass thereon—well realizing that the Indian country was not a part of the public domain. Congress was forced, in the protection of its backward Indian wards, to pass stringent legislation to keep the white man's livestock, and those of some of the more ambitious Indians, off the Indian lands generally. Section

179 of Title 25, U.S.C., which became an Act of Congress on March 1, 1901, (c. 676, Section 37, 31 Stat. 871) is typical of such legislation and prohibits every person, white or Indian, from trespassing on "any lands belonging to any Indian or Indian tribe." It is a penal section and provides for a "penalty of $1 for each animal of such stock." This section is one of the controlling factors of the measure of damages in the case at bar and contributes such penalty in addition to the actual damages suffered by the plaintiff's Indian allottees, as hereinafter set forth.

Congressional protection has thus enabled many individual Indians to accumulate flocks and herds of their own. Some of these Indians are today among the nation's outstanding livestock raisers. The development of the Indian livestock industry on an Indian reservation, such as the Blackfeet Indian Reservation, has its counterpart in the development of the white man's livestock industry of the west. Congress, as it had the early settlers of the West, again encouraged the Indian livestock man. At first, the Indian stockman too was allowed to graze his livestock on his reservation without restriction. But parallelling the development of the Old West, the abundance of Indian livestock, on the limited ranges of the Indian Reservations, soon reached a point when rules and regulations had to be promulgated for the "greatest good for the greatest number" of the Reservations' Indian population. Congress was forced to legislate against the unrestricted grazing of livestock on an Indian reservation, by an Indian, or

his lessee or permittee. It directed the Secretary of the Interior to protect the Indian Reservation ranges from deterioration. Thus the Act of Congress of June 18, 1934 (48 Stat. 986; 25 U.S.C. 466) had its inception. It reads as follows:

> **"Section 466. Indian forestry units; rules and regulations:**
>
> The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to preevnt soil erosion, to assure full utilization of the range, and like purposes. (June 18, 1934, c. 576, Sec. 6, 48 Stat. 986.)"

The rules and regulations which had been promulgated by the Secretary of the Interior in accordance with the expressed mandate of the Act of Congress of June 18, 1934, may be found and are designated as Sections 71.1 to and inclusive of 71.26, Title 25, Code of Federal Regulations of the United States of America. They apply to Indians as well as non-Indian persons. Section 71.3 defines the objectives of the regulations. Section 71.11 treats with Indian competitive bidding and favors those Indians owning less than 250 head of cattle or 1250 head of sheep. Section 71.21 of the regulations deals with trespass. It was amended on March 24, 1942, and now reads:

> "Sec. 71.21 TRESPASS. The owner of any livestock grazing in trespass on restricted Indian

lands is liable to a penalty of $1 per head for each animal thereof together with the reasonable value of the forage consumed and damages to property injured or destroyed.

The following acts are prohibited:

(a) The grazing upon or driving across any restricted Indian lands of any livestock without an approved grazing or crossing permit, except such Indian livestock as may be exempted from permit.

(b) Allowing livestock not exempt from permit to drift and graze on restricted Indian lands without an approved permit.

(c) The grazing of livestock upon restricted Indian lands within an area closed to grazing of that class of livestock.

(d) The grazing of livestock by a permittee upon an area of restricted Indian lands withdrawn from use for grazing purposes to protect it from damage by reason of the improper handling of the livestock, after the receipt of notice from the Superintendent of such withdrawal, or refusal to remove livestock upon instructions from the Superintendent when an injury is being done to the Indian lands by reason of improper handling of livestock.

(R. S. 2117; 25 U.S.C. 179) (Reg. Asst. Sec., March 24, 1942, 7 F. R.")

Section 71.5 of the Regulations, limits the carrying capacity of Indian Reservations and specifically prohibits Indian allottees from trespassing on adjacent Indian range lands.

From these regulations, it will be noted that the livestock man on an Indian Reservation—be he Indian or otherwise—has always been required to avoid trespassing on Indian lands. In other words, it is the

duty of the livestock man to keep his livestock off the lands of others and not the duty of the Indian allottee to protect his lands against such trespasses.

Thus there can be no doubt as to the existence of established rules and regulations for the administration by the Indian Service of grazing rights and privileges on the Blackfeet Indian Reservation. Neither can there be any question about such rules and regulations applying to Indian persons on their own reservations as well as non-Indian permittees.

For some reason or other, appellants introduced as evidence in the case at bar, copies of the "Corporate Charter of the Blackfeet Tribe of the Blackfeet Indian Reservation, Montana," the "Constitution and By-Laws of the Blackfeet Tribe of the Blackfeet Indian Reservation, Montana," and the "Law and Order Code of the Blackfeet Indian Tribe." We are at a loss to understand why the record was so encumbered because none of these documentary exhibits have any bearing whatsover on the case. If appellants are trying to infer that any of these exhibits have given the Blackfeet Tribal Council the authority to administer grazing rights on the Blackfeet Indian Reservation, Sub-paragraph 3, under Sub-paragraph (b) of Paragraph 5, on page 2 of the Corporate Charter, should correct their mistake because it specifically states:

> "3. No action shall be taken by or in behalf of the Tribe which is in conflict with regulations authorized by section 6 of the Act June 18, 1934, or in any way operates to destroy or injure the tribal grazing lands, timber, or other natural resources

of the Blackfeet Indian Reservation."

The Section 6 of the Act of June 18, 1934, referred to in the Corporate Charter, as above quoted, is the Act of Congress which directed the Secretary of the Interior to promulgate the necessary rules and regulations to protect Indian ranges from deterioration. It is conclusive that the administration of all grazing rights and privileges on the Blackfeet Indian Reservation had been reserved to the Secretary of the Interior pursuant to the Act of Congress; and that the Corporate Charter of the Blackfeet Indian Tribe recognizes such fact in positive language so as to avoid any conflict relative to grazing rights on the Blackfeet Indian Reservation such as appellants are attempting to inject into this action.

It is respectfully submitted that the judgment of the lower court was correct in each and every particular.

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